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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1201

EMIL TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 7th, 1971

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	7
Appendix:	
Opinion and Judgment of the Court of Appeals	1a

Citations

Coughlan v. United States, 391 F. 2d 371 (9th Cir., 1968)	5
Mastrian v. United States, 377 U.S. 201 (1964)	4
Reinke v. United States, 405 F. 2d 228 (9th Cir., 1968)	5
United States Ex Rel O'Connor v. State of New Jersey, 405 F. 2d 622 (3rd Cir., 1969)	5

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The Petitioner, Emil Tucker, prays that a writ of certiorari issue to review the judgment and opinion entered on December 8, 1970 by the United States Court of Appeals for the Ninth Circuit in the proceeding entitled United States of America, Appellee, v. Emil Tucker, Defendant-Appellant.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on December 8th, 1970. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

1. Whether it was proper for the Circuit Court of Appeals to condone the admission into evidence of statements elicited from the Petitioner in the absence of retained counsel under circumstances not indicating a clear and intelligent waiver of counsel.

Statutory Provisions

Title 18, United States Code, Section 2314 provides in part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more knowing the same to have been stolen, converted or taken by fraud;
>
> • • •
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Statement of the Case

The facts which underlie the question herein presented relate to the admission into evidence of statements elicited from the Petitioner, over the objection of counsel, subsequent to Indictment and outside the presence of retained counsel. The trial record indicates that as the result of a conversation with the Petitioner, a Department of Justice attorney by the name of McCulley (R 217) notified an Assistant United States Attorney in Los Angeles that the Petitioner "had some information that would be of help to the Federal authorities in Los Angeles concerning certain

people" (R 216). Subsequently the Petitioner contacted an Assistant United States Attorney in Los Angeles who in response to the Petitioner's inquiries, related that while no promises could be given in return for information divulged (R 218), his cooperation would be brought to the attention of the District Court should he ever be convicted in the case that was pending against him (R 218). Petitioner arrived at the office of the Assistant United States Attorney whom he had spoken to and without meeting the Government Attorney who was apparently not in his office, Petitioner encountered two agents of the Federal Bureau of Investigation. After further assurances by the Assistant United States Attorney who related by telephone that anything the Petitioner said could not hurt him (R221, Petitioner signed a waiver of rights form and proceeded to give a detailed account of his involvement in the transaction which was the subject of this Indictment. (R 229-251) The agents then proceeded to make inquiry about a similar transaction that involved one Dalton Smith, one Louis Greenberg, Coca-Cola stock and Coss and Company in New York (R 248-249). The Petitioner, after refusing to discuss that transaction, was told by the agents for the first time that it was that transaction "that they were interested in" (R 225).

The District Court allowed the admission of statements elicited under these circumstances over objection of trial counsel. The Circuit Court of Appeals affirmed said admission.

Reasons for Granting the Writ

The decision below raises an important problem in the administration of Federal criminal justice. The net result of that decision has been to abridge rights of defendants, rights which the decisions of this Court have sought to protect.

The Decision of the Court of Appeals on the issue of the Admissibility of Petitioner's Statement Is in Conflict with Decisions of the United States Supreme Court.

The Court of Appeals has decided that the Trial Court's admission of the Petitioner's statements into evidence over timely objection by Petitioner's Trial Counsel (R 229) was not reversible error because that Court had examined the circumstances under which said statements were elicited, and has found that his statements were voluntary and, therefore, an intelligent waiver of the Petitioner's Constitutional rights. We respectfully submit that this finding is in error.

Petitioner, Emil Tucker, respectfully requests this Court to review the decision of the Court of Appeals in light of this Court's decision in *Massiah* v. *United States*, 377 U.S. 201 (1964). Although in that case the basic facts differ from the case at bar, the underlying principle of the *Massiah* decision would clearly mandate a similar result in the instant case.

In *Massiah*, this Court made it clear that under prescribed circumstances indicating prosecutorial trickery or deceit, a defendant is denied his rights as guaranteed by the Sixth Amendment where "there was used against him

at his trial evidence of his own incriminating words, which Federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel". Decisions of the various Courts of Appeals have made it clear that statements which may be deemed voluntary in nature may be properly admitted even when taken under these circumstances, i.e. post-indictment and in the absence of counsel. *Reinke* v. *United States*, 405 F. 2d 228 (9th Cir., 1968); *Coughlan* v. *United States*, 391 F. 2d 371 (9th Cir., 1968). However, it is unquestionably clear that only a "clear, explicit, and intelligent waiver may legimate interrogation without counsel following indictment". *United States ex rel O'Connor* v. *State of New Jersey*, 405 F. 2d 632 (3rd Cir., 1969). The question herein presented, therefore, is whether the Petitioner effected an *intelligent* waiver of his Fifth and Sixth Amendment rights.

The Assistant United States Attorney who testified to his conversation in Los Angeles with the Petitioner, by his own admission, related that he informed Petitioner that "anything he told us or any information or help that he gave to us would be passed along to the Court at the time that he appeared before the Court, if that came to pass", and that regarding the prospective interview, *"it certainly couldn't hurt"*. (R 221) (Emphasis mine) It is respectfully submitted that in view of the Assistant United States Attorney's assurances that the interview with the agents of the Federal Bureau of Investigation couldn't affect Petitioner adversely, any subsequent statement elicited must be deemed involuntary in that the prosecutor must be charged with knowledge that indeed any such statement relating to the pending Indictment could, in fact, be used against him. The facts make it abundantly clear that it

was the Petitioner's intention to communicate facts which may have benefited him in the circumstances in which he found himself. Furthermore it is clear that the Petitioner was laboring under the impression that his cooperation concerned a matter outside the scope of the Indictment under which he was charged. The caution and hesitancy with which the Petitioner proceeded with respect to these negotiations is certainly unequal to a clear and knowing waiver of his Constitutional rights.

In conclusion it must be emphasized that this Court is not asked to hold that all post-Indictment statements outside of the presence of a retained attorney are per se violative of a defendant's Sixth Amendment rights. The question herein is whether, under these circumstances, where it appears that the Petitioner gave the statements under a misapprehension as to their import and applicability to the Indictment under which he was charged, the Petitioner may be deemed to have made a clear and knowing waiver of his right to counsel. It is respectfully submitted that the facts do not so indicate.

In order that this Court may remedy the Court of Appeals misapplication of these critical principles of law it is respectfully urged that a review of the judgment below is required.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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New York, New York
Counsel for Petitioner

January 7th, 1971

APPENDIX

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 26,063

UNITED STATES OF AMERICA,

Appellee,

vs.

EMIL TUCKER,

Appellant.

[December 8, 1970]

On Appeal from the United States District Court
for the Central District of California

Before:

DUNIWAY and CARTER,

Circuit Judges and

SWEIGERT,

*District Judge.**

PER CURIAM:

The indictment in this case contains two counts charging violations of Title 18 U.S.C. § 2314. Count One charged, in

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* Honorable William T. Sweigert, United States District Judge, Northern District of California, sitting by designation.

substance, that on September 22, 1969, appellant caused to be transported from New York City to Los Angeles, five previously stolen General Motors stock certificates, evidencing 229 shares of common stock, and sixteen previously stolen stock certificates of American Telephone and Telegraph Company, evidencing 170 shares of common stock, of a total value of more than $5,000, knowing the same to have been stolen.

Count Two charged, in substance, that on September 30, 1969, appellant caused to be transported from New York City to Los Angeles, fifty-three previously stolen stock certificates, representing 3,013 shares of common stock in 25 corporations, of a value of more than $5,000, knowing the same to have been stolen.

After court trial without a jury, appellant was found guilty on both counts and sentenced to a term of three years on each count, the terms to be served concurrently.

The evidence was to the effect that the stock certificates transported by appellant between New York and Los Angeles were part of a larger amount of stock stolen in March, 1969, from the Patterson, New Jersey residence of one O'Blenis and that the appellant knew they had been stolen.

IMPROPER USE OF INCRIMINATING STATEMENTS

Appellant, relying mainly on *Massiah* v. *United States*, 377 U.S. 201, contends that during the pendency of this case and in the absence of his attorney the prosecution improperly elicited an incriminating statement from him and thereafter used the statement as evidence against him at the trial.

We have examined the record on this issue and, without reciting the evidence in detail, we merely state that we are of

the opinion that it is to the effect that the interview during which defendant made the statement in question, was sought, not by the government, but deliberately by the defendant, himself; that the statement was made voluntarily, on his own initiative and only after a United States Attorney had expressly inquired whether he desired the presence of his attorney to which inquiry defendant gave his assurance that he had already spoken to his attorney and that the attorney's presence was unnecessary; that defendant was fully informed of his constitutional rights; that there was no overreaching or other unfair tactic on the part of the government; that any right of appellant to have remained silent, or to have had his attorney with him, was clearly waived.

Under these circumstances *Massiah* is inapplicable. See, *Reinke* v. *United States*, 405 F.2d 228 (9th Cir. 1968); *United States* v. *Dowells*, 413 F.2d 801 (9th Cir. 1969); *United States* v. *DeLoy*, 421 F.2d 900 (5th Cir. 1970); *United States* v. *Garcia*, 377 F.2d 321, 324 (2d Cir. 1967).

EVIDENCE OF PRIOR SIMILAR ACT

Appellant next contends that evidence concerning a claimed prior similar act was erroneously introduced at the trial. Appellant concedes that he made neither objection to this evidence nor motion to strike it nor motion for a mistrial.

Again, without detailing the evidence on this issue, we conclude from the record that the evidence discloses a modus operandi similar to the conduct in question at the trial; that it was properly admitted on the issue of the knowledge and intent with which appellant did the acts charged against him and that this evidence was well within the bounds of sound discretion allowed a trial judge in admitting evidence of this

kind. See, *Hernandez* v. *United States*, 370 F.2d 171 (9th Cir. 1966); *Suhl* v. *United States*, 380 F.2d 547 (9th Cir. 1968); *United States* v. *Ovito*, 424 F.2d 276 (9th Cir. 1970); *United States* v. *Klein*, 340 F.2d 547 (2d Cir. 1965).

PROOF OF STOLEN NATURE OF THE CERTIFICATES

Appellant next contends that the government's proof on the issue whether the stock set forth in the indictment had in fact been stolen was hearsay and, as such, improperly introduced over his objection.

This proof came into the record through the testimony of the witness, Bryson, daughter of the elderly owner of the stolen certificates; the witness testified that she had regularly kept a record book of dividends received on the stock owned by her father.

Without detailing her testimony, we conclude that this dividend record book (Ex. 1-A in the record), insofar as it had been regularly kept by the witness and her father, was clearly admissible under the Federal Business Records Act, Title 28 U.S.C. § 1732.

It is true the witness testified that she made additional entries after the burglary to show the certificate numbers of the various stocks; it is also true that this added detail was reconstructed by the witness on the basis of information obtained by her from the transfer agents and treasurers of the various companies.

It is not necessary, however, to decide whether this subsequently added detail was hearsay, as contended by appellant, and as such, incompetent and inadmissible as purported proof of the stolen nature of the stock described in the indictment.

This is so because whatever may be the situation as to Count One, the government's proof of the stolen nature of the stocks described in Count Two of the indictment did not depend entirely upon the above-mentioned record book. (Ex. 1-A).

As to those fifty-three certificates the record shows that the witness, Bryson, examined them (Ex. 5) and clearly established them as the certificates stolen from her father's safe. When appellant objected to the admission of the exhibit on the ground that the witness had actually examined only three of the fifty-three certificates, the court directed her to examine all of them; she did so and testified that none of the endorsements thereon were her father's. Although she did not repeat her earlier testimony about the certificate having been in her father's safe, such was obviously the import of her testimony.

We conclude that the proof was clearly competent and sufficient as to Count Two.

Since the defendant, who was found guilty on both counts of the indictment was sentenced to 3 years on each count, these sentences to run concurrently, there is no need for determining whether there is any evidentiary defect with respect to the certificates described in Count One. This procedure has been previously followed by this court. See, *United States* v. *Parker*, F.2d (9th Cir. Oct. 15, 1970); *McCullough* v. *United States*, 403 F.2d 1013 (9th Cir. 1968); *Pasterchik* v. *United States*, 400 F.2d 686 (9th Cir. 1968); *Chavez* v. *United States*, 387 F.2d 937 (9th Cir. 1967).

The judgment is therefore affirmed.